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Federal Communications Commission

DA 96-1229

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 95-44
Table of Allotments,)	RM-8602
FM Broadcast Stations.)	
(Fair Bluff, North Carolina))	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1996

Released: August 2, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration and motion for stay filed by Atlantic Broadcasting Co., Inc. ("Atlantic") of the August 11, 1995, Report and Order ("Report and Order II"), 10 FCC Rcd 9255 (1995). The Report and Order denied Atlantic's request to delete vacant and then unapplied-for Channel 287A at Fair Bluff, North Carolina, or alternatively to impose a 12.7 kilometer (7.9 mile) northeast site restriction on the allotment.¹ Atlantic also seeks reconsideration of the Order rescinding the July 26, 1995, Report and Order ("Report and Order I"), 10 FCC Rcd 8244 (1995) which denied petitioner's request to delete Channel 287A at Fair Bluff but granted that portion which requested the imposition of the site restriction.² Comments in opposition were filed by S.O.S. Broadcasting ("SOS"), to which Atlantic replied.

Background

2. Atlantic, licensee of Station WDAR-FM, Channel 288C3, Darlington, South Carolina, currently operates with a directional antenna to protect the Fair Bluff allotment. It requested either the deletion of Channel 287A at Fair Bluff or the imposition of a different site restriction on the allotment in order to accommodate Station WDAR-FM's pending application (BMPH-950224ID) to operate omnidirectionally. In response to the Notice of Proposed Rule Making, three parties filed comments expressing an intention to apply for the Fair Bluff allotment. One of these parties, S.O.S. Broadcasting ("SOS"), objected to the imposition of the requested site restriction, stating that the viability of the prospective station could be harmed because of the limited city-grade contour of a Class A station, while one of the remaining two parties stated that it had no objection to the new site restriction, and the last party was silent on this subject.

¹ Public Notice of the filing of the petition for reconsideration was given on October 23, 1995, Report No. 2108.

² The July 26, 1995, Report and Order, 10 FCC Rcd 8244 (1995), was rescinded by Order, released August 10, 1995 (DA 95-1772).

3. The Commission assumes, at the allotment stage, that city-grade coverage can be provided by Class A stations where the transmitter is located no more than 16.2 kilometers (10.1 miles) from the center of the community. In Report and Order I, we found that the objections of SOS were speculative because the proposed site restriction was within the distance limitations where such coverage is generally assumed, and SOS provided no technical showing to the contrary. Therefore, while Report and Order I retained Channel 287A at Fair Bluff to accommodate the expressions of interest submitted in response to the rule making, we did impose the site restriction to accommodate Atlantic's pending application.

4. Subsequently, however, on the Commission's own motion, this action was rescinded and Report and Order II was issued which denied both components of Atlantic's request. We declined to impose the requested additional site restriction based on the Commission's policy to allot channels with the least site restriction possible in order to provide prospective applicants with the greatest flexibility in selecting transmitter sites. In addition, Report and Order II restated the Commission's general policy of not changing reference coordinates for vacant allotments in the course of a rule making proceeding in the absence of other changes in the Table of Allotments or to entertain rule making petitions solely to change reference coordinates, citing Chatom, Alabama, 10 FCC Rcd 7725 (1995), and Grenada, Mississippi, 7 FCC Rcd 4838 (1992).

5. In its petition for reconsideration, Atlantic does not dispute that the Commission will not propose to change an allotment's reference coordinates unless a change in the Table of Allotments is also proposed. It does disagree that its proposal falls under this prohibition because it did request a change in the Table of Allotments, namely, the deletion of Channel 287A from Fair Bluff. Atlantic also contends that the retention of the channel at Fair Bluff in light of the expressions of interest received during the course of the proceeding should not have prevented the Commission from imposing the requested site restriction. To do so, it argues, "elevates form over substance to maintain a policy that serves no purpose and which does not serve the public interest." As to the cases cited by the Commission in support of the denial, Atlantic states that neither the Chatom, AL nor Grenada, MS cases supra, present similar fact patterns and are thus not controlling. It states that in Chatom, AL, the petitioner proposed no change to the Table of Allotments and at the time the petition was filed there was an application pending for use of the channel. Thus, imposing a site restriction would have meant that the pending applicant would have been required to amend its application. Here, Atlantic did propose a change in the Table of Allotments, and there were no applications on file for the Fair Bluff allotment. Thus no party could have been adversely affected by the imposition of the site restriction. In Grenada, MS, the issue of a new transmitter site restriction was raised for the first time as part of a petition for reconsideration as well as the introduction of a new community to the rule making. Thus, the proposal was found to be an untimely filed counterproposal and denied. In this proceeding, the issue of imposing a different site restriction on the Fair Bluff allotment was part of the original petition for rule making, the public was afforded ample opportunity to comment, and the Commission could carefully consider whether to impose the new site restriction.

6. Atlantic points out that the Commission, in Report and Order II, stated that the policy against changing an existing site restriction absent a corresponding change in the Table of

Allotments is to avoid compromising the integrity of the Table. However, it argues that there would be no negative impact from the imposition of the new site restriction, submitting that the site restriction would not prevent the filing of an application for the Fair Bluff channel. In fact, Atlantic points out that not only did it identify a potential transmitter site but also presented evidence that the site would be available, would likely pass local zoning requirements and that the Federal Aviation Administration ("FAA") would likely also approve use of the site. Thus, it avers that the integrity of the Table would not be compromised by the imposition of the new site restriction. Atlantic argues that the Commission's concern that prospective applicants who may be in the process of obtaining a specific transmitter location for the vacant FM channel would be harmed is also misplaced. Again, it points out that at least one available and technically feasible site has been identified.

7. Atlantic contends that the Commission has not explained how it could base its denial of the petition in Report and Order II on the same "unfounded" concerns that were dismissed in Report and Order I and thus submits that the decision in Report and Order II is arbitrary, capricious and at odds with the public interest. It claims that we failed to consider the real benefit to the public which would result from Station WDAR-FM operating as an omnidirectional station versus the theoretical burden of locating a transmitter within a restricted area. In addition, Atlantic points out that no consideration was given to the delay in new service at Fair Bluff which could result from the filing of multiple applications because of the freeze on processing mutually exclusive applications, pursuant to the decision in Bechtel v. FCC, 10 F.3rd 875 (D.C. Cir. 1993).

8. SOS opposes the imposition of the additional site restriction requested by Atlantic. It states that imposing the "substantial" site restriction would "severely" limit the choices of potential transmitter sites available to SOS and other interested applicants. It argues that although Atlantic has identified one possible transmitter site, no showing has been made that this site is the best site or that it would provide sufficiently good coverage of both the community and market to make the station viable. In addition, SOS contends that if any difficulties arise with the use of Atlantic's identified site after the reference coordinates are changed, there would be little recourse by the Fair Bluff applicants, thus possibly preventing the station from being activated. SOS also argues that imposing the additional site restriction contravenes the Commission's long-standing policy of allotting channels with the least site restriction possible, citing Vacaville, CA, 4 FCC Rcd 8315 (1989), recon. denied, 6 FCC Rcd 143 (1991).

9. SOS also submits that Atlantic's proposal goes directly against the Commission's policy of not changing reference coordinates for vacant allotments without making other changes in the Table of Allotments though a rule making proceeding. It states that once an expression of interest in the Fair Bluff allotment was received and the Commission determined that the channel would be retained, to then adopt the remainder of Atlantic's proposal would result in an Order only changing the allotment's reference coordinates, precisely the result the Commission seeks to avoid. SOS argues that if the Commission changes its policy and adopts Atlantic's proposal, it would be a simple matter for other stations to have a vacant channel's reference coordinates changed by merely proposing the channel's deletion. It believes that such a policy

would create significant uncertainty for prospective applicants for such vacant channels who might be in the process of obtaining a site location, only to have a site restriction imposed which would alter the area available for use. Thus, it argues that the change in policy would indeed compromise the integrity of the Table.

10. Finally, SOS submits that Atlantic has not shown that the imposition of the additional site restriction is the only means for Station WDAR-FM to achieve omnidirectional operation or that the station's present coverage is inadequate. Further, although Atlantic states that the station would serve more people, it points out that no showing, or even an allegation, has been made that the people within the gain area are not already well served by other area stations. Therefore, it argues that Atlantic has not shown that the benefits accruing from the adoption of its proposal would outweigh the detriments.

11. In response, Atlantic again states that there would be no negative impact on prospective applicants from the imposition of the new site restriction because it has identified a possible transmitter site and submitted evidence that the site is available, would likely comply with local zoning requirements and that the site would obtain the approval of the FAA. Contrary to SOS' argument, Atlantic contends that it has shown the public interest benefits which would accrue from a grant of its request, that is, the ability of Station WDAR-FM to operate omnidirectionally and provide service to an additional 3,800 persons without any negative impact on the potential for new service at Fair Bluff. It submits that such a showing of public benefit should be "more than sufficient" to support the imposition of the requested site restriction. Further, it states that SOS has again failed to show how the imposition of the site restriction would have a negative impact on potential Fair Bluff applicants. In fact, Atlantic states that it has filed an application for the Fair Bluff channel, specifying the same transmitter site as proposed herein.

12. Finally, Atlantic again states that a grant of its proposal will not result in a change of the Commission's policy not to change reference coordinates for vacant allotments without making other changes to the Table of Allotments through a rule making proceeding. Atlantic reiterates that it did propose a change in the Table of Allotments, namely the deletion of Channel 287A from Fair Bluff. The fact that the channel was retained at Fair Bluff because three parties submitted expressions of interest in the allotment should not result in the denial of the site restriction proposal. To do so, Atlantic again states, would elevate form over substance and maintain a policy that serves no purpose and disserves the public interest. Atlantic also disagrees that the adoption of its proposal would open a "Pandora's box," as suggested by SOS. It submits that the Commission has specifically stated its criteria for the imposition of a site restriction and that it has met this criteria, that is, the proposal requested a change in the Table of Allotments, it demonstrated that no adverse effect would result from the new site restriction, and the public interest would be served by permitting the enhanced operation on Station WDAR-FM.

DISCUSSION

13. For the reasons set forth below, we find that the public interest would be served by granting Atlantic's petition for reconsideration and imposing the requested site restriction on Channel 287A at Fair Bluff.³ We find that this case does not fall under the Commission's policy of not changing the reference coordinates of an allotment absent other changes to the Table of Allotments. The essential purpose of that policy is to ensure that the public is given notice and an opportunity to comment on proposed changes. The ability of the Commission to provide such notice and an opportunity to participate is afforded where, as here, Atlantic proposed a change to the Table of Allotments, namely the deletion of Channel 287A at Fair Bluff, and the Commission so proposed. As an alternative to the deletion should a party express an intention to apply for the Fair Bluff channel, Atlantic also proposed the change in the channel's reference coordinates. Because a change in the Table was proposed, the Commission was able to give notice to all interested parties that a possible outcome could be a change in the reference coordinates, thus affording these parties an opportunity to present evidence of the impact that such a change would have on the activation of the channel. This situation is unlike Chatom, supra, where no change in the Table of Allotments was proposed, or Grenada, supra, where the proposed site restriction was raised for the first time on reconsideration. Where a party seeks nothing more than a change in an allotment's reference coordinates, it is not possible to seek such input from the public because no change in the rules is proposed. Therefore, the above policy refers only to those cases where nothing more than a change in an allotment's reference coordinates is requested.

14. SOS argues that allowing parties to optionally propose the deletion of a vacant and unapplied-for channel or a change in the reference coordinates if interest in use of the channel is expressed would create significant uncertainty for prospective applicants who may be in the process of obtaining a transmitter site, only to find that the site is unacceptable because of a change in the reference coordinates. As stated above, the Commission will not consider a request to only alter a channel's reference coordinates absent other proposed changes to the Table because there is no vehicle available which would afford the public notice of the proposed change and an opportunity to comment on the effect of such a change. We agree that to effect such a change without an opportunity for comment by potential applicants would indeed compromise the integrity of the Table. However, this is not the case where a Notice of Proposed Rule Making is issued affording all parties an opportunity to comment on either the deletion of a channel or a change in the channel's reference coordinates. We do not see where a prospective applicant is subject to any more uncertainty from the consideration of a petition that alternatively proposes either the deletion of a vacant channel or a change in the channel's reference coordinates than would arise from the filing of an application for a new station nearby or a transmitter site change for an existing station which protects the vacant channel's reference coordinates but impinges on the total land area available for a transmitter site. Further, we do not believe that the public

³ The coordinates for Channel 287A at Fair Bluff are 34-21-22 North Latitude and 78-54-36 West Longitude.

interest is served by stymying an existing station's efforts to improve its facilities because of the existence of a vacant and unapplied-for channel

15. SOS also argues that imposing a greater site restriction on the Fair Bluff allotment contravenes the Commission's policy of allotting channels with the least site restriction possible, citing Vacaville, CA, *supra*. We find that SOS's reliance on the Vacaville, CA, decision is misplaced. That decision does state that if a proposed allotment requires a site restriction, the Commission will endeavor to impose that which is the least restrictive theoretical site from the intended city of license. This policy came into play as part of the reason for considering the allotment of Channel 254A in lieu of the requested Channel 238A at Middletown, CA in order to resolve a mutual exclusivity with another petition seeking the upgrading of the Vacaville station from Channel 237A to Channel 237B1. Therefore, we find that the Vacaville, CA decision also stands for the policy that the Commission will not deny another station's request to improve its facilities solely because of a party's site preference.

16. The Commission is charged with the responsibility for allotting channels to the various communities in furtherance of the public interest, convenience and necessity. In so doing, the Commission attempts to provide as many communities as possible with a local transmission service. The Commission has also found that the public interest is served by enabling stations to use the scarce radio frequency in the most efficient manner in order to provide as many people as possible with service from as many stations as possible. While these two goals are generally compatible with each other, there are instances, such as this one, where competing interests must be balanced. Here, the balance is between the benefits accruing from providing prospective applicants with as much flexibility as possible in selecting a transmitter site for a vacant allotment at Fair Bluff and the benefit arising from an existing station being able to improve its facilities by operating omnidirectionally which is a new service being provided to 3,800 persons. In this case, we find that Atlantic has persuasively shown that the imposition of the additional site restriction on the Fair Bluff channel will not impede the activation of the channel. It has identified a potential transmitter site, submitted evidence that the site is available, and would also likely receive both local and governmental approval for use as a radio transmission tower. Further, two of the three participants in this proceeding have raised no objection to the imposition of the new site restriction while SOS has provided nothing more than speculation as the basis for its objections.⁴

17. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Atlantic Broadcasting Co., Inc. IS GRANTED. IT IS FURTHER ORDERED, That the Motion for Stay filed by Atlantic Broadcasting Co., Inc. IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

⁴ Two timely applications for use of Channel 287A at Fair Bluff have been received and each has specified a transmitter site which complies with the mileage separation requirements vis-a-vis Atlantic's pending application to operate Station WDAR-FM omnidirectionally

19. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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